European Commission
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Damages actions for breach of the EC antitrust rules
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WHITE PAPER ON DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES

General remarks

The Confederation of Finnish Industries EK is the leading business organisation in Finland. It represents the entire private sector, both industry and services, and companies of all sizes. EK’s member companies represent more than 70 percent of Finland’s gross domestic product and over 95 percent of exports from Finland. EK has 35 different branch federations with a membership of 16,000 companies in all, which employ about 950,000 employees.

EK welcomes the Commissions follow-on consultation on Damages Actions for breach of the EC antitrust rules. The White Paper and the Staff Working Paper offer measures envisaged by the Commission to enhance private actions for damages. The follow-on consultation is a continuation for the consultation on the Green Paper published in 2005. EK appreciates that the Commission has taken into account many of the views expressed by stakeholders on the Green Paper. However, the White Paper still raises fundamental issues that need to be further discussed.

EK is definitely in favour of developing and sustaining a competitive commercial environment in the EU and is convinced that competition provides the best incentive for business efficiency, encourages innovation and guarantees the best choice for consumers. Antitrust law is crucial and EK recognises that its enforcement is fundamental to creating and sustaining a competitive economy. There also needs to be efficient redress systems for companies and consumers.

However, EK considers it inappropriate to use EC competition law to harmonise important aspects of Member States’ procedural and tort law. The civil justice systems of Member States have been built up...
over years and they reflect national cultures. Damages actions are a classic area of private law where the principle of subsidiary must apply. Further, competition law issues should not be treated differently than any other Community law issues unless there is a clear need for a reconciliation of the specific features of competition law and procedural and tort law, such as the reconciliation of the leniency system with private enforcement. Only in those cases there might be a need to harmonise Member States’ procedural and tort laws and even then this should be done in a way that respects basic principles of national tort and procedural laws.

EK supports effective redress for antitrust violations, but the aim to increase litigation is against to the public policy of many Member States. Encouraging more and more litigation would increase chances of divergent decision-making with obvious negative implications for the ability of companies to compete on their own merits and could also lead to companies avoiding new forms of innovative and pro-competitive behaviour to the detriment of their competitiveness. Thus, the main aim should be to reinforce the public enforcement of antitrust rules and encourage the use of non judicial redress mechanisms available in Member States.

EK would also like to note that the proposal on collective actions is related to the boarder Commission’s initiative on collective redress in the field of consumer protection. Considering specific measures in the field of competition law before a general position at the EU level on this issue is taken is premature.

As the White Paper does not justify any legislative initiative at the EU-level, the Commission should use the principles in the White Paper to provide a set of non binding benchmarks. These benchmarks could provide guidance and standards for Member States when amending and improving their national competition regimes.

As a general remark EK would like to point out that there are some inconsistencies between the two Papers which create some confusion.

Private enforcement

The White Paper correctly recognises the importance of public enforcement in the field of competition law. It also recognises the different objectives persuaded by public enforcement and private actions. However, the aim of the Commission seems to be to create a system of private enforcement through damages actions.

EK wants to stress that the aim of private actions for damages cannot and should not be the enforcement of antitrust laws. The object of private actions is to provide a private law remedy for compensation and
therefore, the aim of the Commission should be to strengthen public enforcement of antitrust laws.

EK also considers it inappropriate to use EC competition law to harmonise important aspects of the Member States’ tort and procedural law. Only if there are discrepancies between competition law and procedural and tort law the Commission should take the initiative. For example, if there is a clear need to render the leniency programme compatible with the tort law. The success of the leniency programme should not be ruined by the collision between competition law and private enforcement.

Broad rule of standing and retention of the passing-on defence

The White Paper advocates a broad rule of standing for indirect purchasers and consumers and at the same time it proposes the retention of the passing-on defence. EK considers that the broad rule of standing requires the allowing of the passing-on defence i.e. it is an essential requirement for the broad rule of standing. Otherwise, there would be a risk of unjust enrichment for those purchasers that passed on the illegal overcharge to their customers and of multiple compensations of the overcharge.

The Commission is proposing the introduction of a rebuttable presumption according to which the illegal overcharge is passed on to indirect purchasers in its entirety. EK would like to point out that the broad rule of standing requires that the plaintiff is able to prove that he has suffered loss. Any measure departing from this principle enables possible abuses and therefore the presumption should not be introduced. The fact that it is in some cases difficult to prove the damage cannot be a reason for introducing such a presumption.

Collective actions

The White Paper introduces a Community level collective relief mechanism. Even though the White Paper proposals are different from the US opt-out class actions, the proposals are groundbreaking and would lead to striking changes in the national systems.

As mentioned above, EK supports effective and easy access to justice for those who have suffered harm by breaches of antitrust rules. It is also in the interest of companies to have adequate redress mechanism. However, collective actions have often limited merits for consumers. In general, they are complex and lengthy procedures that do not facilitate the administration of justice and are rarely beneficial to consumers.

EK considers that the proposals of the White paper should be seriously re-evaluated. They would lead to a situation where collective, repre-
sentative and individual actions coexist. This would lead to a situation where the system could be easily abused and would thus have detrimental impact on business. EK believes that there should not be special procedures for bringing collective damages actions in the field of antitrust law. The Commission should instead encourage Member States to set up non judicial, alternative dispute resolution systems in order to enhance consumers’ possibilities to claim damages for antitrust violations.

The issue of collective actions is strongly related to the wider initiative on collective redress carried out by the Commission in the field of procedural and consumer law and should not be dealt with under the auspices of competition law. It is also premature to consider specific proposals before a general stand at the EU level is taken on this issue. The Commission should not go on with sector-specific harmonisation before it has first attempt to introduce more general collective relief measures.

Access to evidence

The Commission is proposing to give the courts increased powers to order disclosure even when the plaintiff has not fully substantiated his claim with the required evidence. In addition, the discovery should exceptionally be ordered also against third parties.

EK would like to point out that in civil law jurisdictions, the civil procedure is based on the system of fact pleading. This means that the parties must set out in reasonable detail the relevant facts of their case and describe the specific evidence. The Commissions’ proposal would mean a very far-reaching change in the national civil discovery systems. EK strongly believes that there should be no special rules on disclosure of documentary evidence in civil proceedings. EK also doubts whether the proposed proportionality test can be applied uniformly and efficiently in all Member States. Therefore, there is a clear risk that the malfunctioning of this test may be much more dangerous than its claimed advantages.

In addition, EK urges the Commission and the Member States to grant qualified in-house counsel legal privilege. When in-house counsel is properly qualified and complies with adequate rules of professional ethics and disciplines, his valuable legal advice should be privileged. When consulting their own in-house lawyers, executives must be able to rely on their counsel’s professional secrecy and should not be discouraged from consulting them because confidential deliberations risk being disclosed.

Interactions with the leniency programme
The Commission is proposing to introduce special rules regarding interactions with the leniency programme and special measures for refusal to produce evidence and to preserve relevant evidence.

In order to guarantee the effectiveness of the competition law enforcement and the leniency programme, it is important to protect the integrity and attractiveness of the leniency programme. Therefore, EK welcomes the proposal for protecting corporate statements submitted by leniency applicants against court orders requesting their disclosure. This would ensure the effectiveness of the leniency programme without excluding liability. EK also believes that the proposals in the Staff Working Paper regarding the possibility to exclude the immunity recipient’s liability should be further developed. Such a solution could increase incentives to apply for leniency.

EK would like to point out that the Working Paper does not discuss the interaction of the leniency programme with the Commissions’ Direct Settlement procedure even though there is a clear need to clarify the issue.

**Binding nature of national competition authorities’ (NCAs) decisions**

The Commission is proposing that the final infringement decisions of the NCAs would have binding effect on follow-up civil actions. The Commissions’ aim is to gain cost and timing benefits for potential claimants. EK would like to stress that these factors cannot be given precedence over more important and general principles of law and policy, such as the principles of separation of powers and judicial independence.

EK believes that the Commissions’ proposal is problematic for many reasons and would undermine the role of courts as enforcers of equal standing. It would also fail to take into account the great variety of national administrative and judicial review systems and the independence of the NCAs and courts.

Having said this EK would like to point out that in practice NCAs infringement decisions have a highly persuasive value for civil courts and are taken into account as evidence or a rebuttable presumption of antitrust infringement.

**Fault requirement**

The Commission recommends that the infringer should be liable for damages caused, unless he demonstrates that the infringement was the result of a genuinely excusable error once the antitrust breach has been proven. This would create a presumption of fault once the infringement has been proven.
EK wants to point out that the proposal would lead to a reversal of the burden of proof of fault with respect to the system normally used in most Member State. In Finland for example, the plaintiff is normally required to demonstrate both his own entitlement to relief and the defendant’s fault. It is also important to keep in mind that the causal link between antitrust infringement and the damage must always be proven.

EK believes that there is no reasonable ground to shift the burden of proof to the defendant in antitrust cases. In many cases, the competition law is not always sufficiently clear for companies to be able to rely on self-assessment of their agreements or practices. Particularly problematic may be liability in cases of novel abuses of dominant position or non-hardcore agreements which may have certain pro-competitive benefits but are considered on balance to be unlawful. In such cases, a strict liability rule with restrictive excusable error defence will give rise to serious concerns.

**Damages**

EK welcomes the Commissions’ focus on the actual damage suffered and on the exclusion of punitive elements. EK supports the existence of effective redress mechanisms; it is important that damages are awarded on the basis of the provable actual loss suffered by the claimant as a result of the infringement.

**Limitation periods**

EK welcomes the Commissions’ acknowledges of the importance of limitation periods in proving legal certainty. However, at the same time the Commission is proposing that a new limitation period for follow-up civil actions of at least two years should be introduced. The new limitation period should start to run once the infringement decision on which the claimant relies in his antitrust damages action has become final. EK sees that the proposal for extending limitation periods with a view to easing plaintiffs’ practical difficulties is not in line with the legal certainty. Further, EK does not see why different rules should apply to damages actions for competition law infringements.

**Cost of actions**

The Commission is proposing that national courts should be given the possibility of issuing cost orders derogating from the normal cost rules, i.e. the loser pays principle.

EK believes that such a special cost rule would unduly interfere with the traditional national rules and principles and create uncertainty as to who will have to pay the costs of actions. The loser pays principle is indispensable and any type of exception to the principle will foster liti-
gation culture which is contrary to European legal traditions. Besides, existing cost rules of the courts of the Member States are sufficiently reasonable to provide for a fair recovery and they consequently do not pose any real obstacles to bringing in an action for damages if a plaintiff has a strong case. Competition law breaches should not be treated more favourable than other injuries or fraud and therefore, the normal procedural rules of the Member States should apply also to competition law issues.

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